

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM D. MCCULLOUGH, SR.)	JUDGE PAUL R. MATIA
)	
Petitioner)	CASE NO. 3:04CV7673
)	
-vs-)	
)	<u>MEMORANDUM OF OPINION</u>
KHELLEH KONTEH, WARDEN)	<u>AND ORDER</u>
)	
)	
Respondent)	

This is an action for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The case was referred to a United States Magistrate Judge for a Report and Recommendation under 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.2. On April 5, 2005, the magistrate judge found that the petition for writ of habeas corpus was untimely filed and recommended that the petition be dismissed. (Doc. 14). The petitioner was informed by the magistrate judge that objections to the Report and Recommendation must be filed within ten days of receipt of the notice and that failure to object within the specified time waives the right to appeal the district court's order. Upon motion by the petitioner, leave was granted to file objections to the Report and Recommendation until May 18, 2005. Instead of filing objections, the petitioner filed a notice of

dismissal without prejudice. Pursuant to Fed. R. Civ. P. 41(a)(1). (Doc. 17).

28 U.S.C. § 2244 requires that a petition for habeas corpus be filed within one year from the date on which direct review of the judgment was completed or the time to pursue review expired. Once that time period has expired it cannot be revived by the filing of state collateral review. *Vroman v. Bragano*, 346 F.3d 598, 601-02 (6th Cir. 2003). The petitioner's conviction became final on November 30, 2001. The habeas corpus action was filed on October 22, 2004. Equitable tolling is not applicable.

Based on the above discussion, there is no reason for the Court to dismiss this action without prejudice. The original petition, having been untimely filed, can never succeed. Petitioner cannot validly refile his habeas petition because the limitation period under the AEDPA has expired. *Palmer v. Carlton*, 276 F.3d 777, 779 (6th Cir. 2002). Further, petitioner was ordered to file objections within ten days of the receipt of the Report and Recommendation as provided by 28 U.S.C. § 636(b)(1)(C). Thus, he is precluded from appealing. He should not be allowed to circumvent the statute by filing a notice of dismissal after receiving the unfavorable Report and Recommendation and warning about filing timely objections.

Accordingly, after *de novo* review, the Court adopts the magistrate judge's Report and Recommendation. The petition for writ of habeas corpus is dismissed.

IT IS SO ORDERED.

Date: May 31, 2005.

/s/ Paul R. Matia
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

A copy of this Memorandum of Opinion and Order was filed electronically this 31st day of May, 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. A copy of the foregoing Memorandum of Opinion and Order was also sent by United States mail on May 31, 2005 to William D. McCullough, Sr., #420784, Toledo Correctional Institution, 2001 Central Avenue, East, Toledo, Ohio 43608.

/s/ Paul R. Matia
UNITED STATES DISTRICT JUDGE